No. 81-55

Office-Supreme Court, U.S.
FILED
JUL 11 1981
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PAUL IRA FERBER,

Respondent.

On Petition for Writ of Certiorari to the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Petitioner
One Hogan Place
New York, New York 10013
(212) 553-9310

ROBERT M. PITLER
MARK DWYER
DONALD J. SIEWERT
Assistant District Attorneys
Of Counsel

Question Presented

To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?

The New York State Court of Appeals answered this question in the negative.

TABLE OF CONTENTS

	PAGE
Question Presented	I
Table of Authorities	IV
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement	4
The Judgment Below	6
Reasons for Granting the Writ	8
Conclusion	20

TABLE OF AUTHORITIES

PAGE

Cases:

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) ..17, 19

Ginsberg v. New York, 390 U.S. 629 (1968) 15, 16

Miller v. California, 413 U.S. 15 (1973) 11

People v. Ferber, 96 Misc.2d 669 (S. Ct., N.Y. Co., 1978), *aff'd without op.*, 74 A.D.2d 558 (1st Dept. 1980), *rev'd*, 52 N.Y.2d 674 (1981) 2, 5, 6, 7, 8

Prince v. Massachusetts, 321 U.S. 158 (1944) 15

United States v. Various Articles of Obscene Merchandise, 600 F.2d 394 (2d Cir. 1979) 11

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 18

Constitutional Provisions:

United States Constitution, First Amendment 2, 5, 6, 7, 15, 19

United States Constitution, Fourteenth Amendment .. 2

Statutes:

N.Y. Penal Law §235.00(1)(c) 11

N.Y. Penal Law §263.00 2

N.Y. Penal Law §263.05 3

N.Y. Penal Law §263.10 .....4, 5, 6

N.Y. Penal Law §263.15 .....4, 5, 6, 9, 11, 12,14, 16, 19

18 U.S.C. §§2251-2253 .....11, 12

Ariz. Rev. Stat. Ann. §13-3553 ..... 8n

PAGE

Colo. Rev. Stat. §18-6-403(3)(b) 8n

Del. Code Ann. tit. 11, §§1108, 1109 ..... 8n

Hawaii Rev. Stat. §707-751 ..... 8n

Ky. Rev. Stat. §§531.320, 531.340-531.360 ..... 8n

La. Rev. Stat. Ann. §14:81.1(A)(3) 8n

Me. Rev. Stat. Ann. tit. 17, §2923(1) 8n

Mass. Ann. Laws ch. 272, §29A 9n

Mich. Comp. Laws Ann. §750.145c(3) 9n

Miss. Code Ann. §97-5-33(4) 9n

Mont. Rev. Codes Ann. §45-5-625 ..... 9n

N.J. Stat. Ann. §2C:24-4(5) 9n

Okla. Stat. Ann. tit. 21, §1021.2 ..... 9n

Pa. Cons. Stat. Ann. §6312(c) 9n

R.I. Gen. Laws §11-9-1.1 ..... 9n

S.D. Codified Laws Ann. §22-22-24 ..... 9n

Tex. Penal Code Ann. tit. 9, §43.25(e)(Vernon) 9n

W. Va. Code §61-8C-3 ..... 9n

Wis. Stat. Ann. §940.203(4)(West) 9n

Other Authorities:

Anson, *The Last Porno Show*, 8 New Times 46 (1977), *reprinted in* Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977), pp. 150-58 ..... 13n

PAGE

Benward and Densen-Gerber, *Incest As a Causative Factor in Anti-Social Behavior: An Exploratory Study*, 4 Contemp. Drug Prob. 322 (1975) 17n

Burgess, Groth and McCausland, *Child Sex Initiation Rings*, 51 Am. J. Orthopsych. 110 (1981) 13n

Campbell, *Help Sought for Children Used in Pornography, New York Times*, Jan. 14, 1977, Pt. II, p. 3, col. 1 ..... 13n

Child Pornography: Outrage Starts to Stir Some Action, U.S. News and World Report, June 13, 1977, p. 66 ..... 13n

Child's Garden of Perversity, Time, April 4, 1977, p. 55, *reprinted in* Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) pp. 423-24 ..... 13n

Ditkoff, *Child Pornography*, American Humane, April 1978, pp. 29-32 ..... 13n

D. Finkelhor, *Sexually Victimized Children* (1979) 16n

Guio, Burgess and Kelly, *Child Victimization: Pornography and Prostitution*, 3 J. of Crime and Justice 65 (1980) 13n

H.R. Rep. No. 95-696, 95th Cong., 1st Sess. (1977) 11, 12

Ivins, *Eight Held As Principals in Smut Production, New York Times*, April 27, 1977, p. 1, col. 6 ..... 13n

James and Meyerding, *Early Sexual Experience As a Factor in Prostitution*, 7 Archives of Sexual Behavior 31 (1978) 16n

R. Kempe and C. Kempe, *Child Abuse* (1978) 16n

PAGE

Kiddie Porn, 60 Minutes, vol. IX, no. 33, May 15, 1977, *reprinted in* Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977), pp. 123-30 ..... 13n

Lewis and Sarrel, *Some Psychological Aspects of Seduction, Incest and Rape in Childhood*, 8 J. Am. Acad. Child Psych. 606 (1969) 16n

R. Lloyd, *For Money or Love: Boy Prostitution in America* (1976) 13n

K. Meiselman, *Incest: A Psychological Study of Causes and Effects with Treatment Recommendations* (1978) 17n

Pope, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 Ill. L.F. 711 10

Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 12n, 13n

S. Rep. No. 95-438, 95th Cong., 2nd Sess. (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 40 ..... 11, 12

Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289 (1980) 16n

Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 12, 12n, 13n, 17n

PAGE

Sexual Exploitation of Children, Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) 13n, 16n, 17n

Sneed, Bliss, Moseley, *et al., Child Pornography: Sickness for Sale* and other articles, *Chicago Tribune*, May 15-17, 1977, *reprinted in* Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977), pp. 428-42, *and in* Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977), pp. 130-50 ..... 13n

Summit and Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 Am. J. Orthopsych. 237 (1978) 13n, 16n, 17n

No.

IN THE

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

PAUL IRA FERBER,
Respondent.

On Petition for Writ of Certiorari to the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

To: The Honorable Chief Justice and the Associate Justices of the Supreme Court:

The District Attorney of New York County on behalf of the People of the State of New York petitions for a writ of certiorari to review the judgment of the New York State Court of Appeals in this case.

Opinions Below

The opinion of the New York Court of Appeals is set forth at App. A, *infra* and is reported at 52 N.Y.2d 674. The order of the Appellate Division, First Department,

affirming the judgment of conviction without opinion is set forth at App. B, *infra* and is reported at 74 A.D.2d 558, 424 N.Y.S.2d 967. The opinion of the trial judge denying respondent's motion to dismiss the indictment is set forth at App. C, *infra* and is reported at 96 Misc.2d 669, 409 N.Y.S. 2d 632.

Jurisdiction

The judgment of the New York Court of Appeals was entered on May 12, 1981 (App. A, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions Involved

The First Amendment of the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law . . . .

The relevant sections of Article 263 of the New York Penal Law provide:

> §263.00 *Definitions*
>
> As used in this article the following definitions shall apply:
>
> 1. "Sexual performance" means any performance or part thereof which includes sexual conduct by a child less than sixteen years of age.

2. "Obscene sexual performance" means any performance which includes sexual conduct by a child less than sixteen years of age in any material which is obscene, as such term is defined in section 235.00 of this chapter.

3. "Sexual conduct" means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.

4. "Performance" means any play, motion picture, photograph or dance. Performance also means any other visual representation exhibited before an audience.

5. "Promote" means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

6. "Simulated" means the explicit depiction of any of the conduct set forth in subdivision three of this section which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks.

7. "Deviate sexual intercourse" means the conduct defined by subdivision two of section 130.00 of this chapter.

8. "Sado-masochistic abuse" means the conduct defined in subdivision five of section 235.20 of this chapter.

§263.05 *Use of a child in a sexual performance*

A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less

than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance.

Use of a child in a sexual performance is a class C felony.

§263.10 *Promoting an obscene sexual performance by a child*

A person is guilty of promoting an obscene sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any obscene performance which includes sexual conduct by a child less than sixteen years of age.

Promoting an obscene sexual performance by a child is a class D felony.

§263.15 *Promoting a sexual performance by a child*

A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.

Promoting a sexual performance by a child is a class D felony.

Statement

On March 2, 1981, Paul Ira Ferber, the owner of a Manhattan bookstore specializing in pornography, sold two films to an undercover police officer. The films are devoted almost exclusively to depicting young boys masturbating. The first film shows a naked young boy lying face down on a bed, rubbing against the bed. After a while, the boy turns over onto his back and masturbates twice to ejaculation.

Then, lying on his side, he places a dildo between his buttocks as if to insert it into his anus. The second film shows a naked young boy masturbating to ejaculation and inserting a dildo into his anus. The second film also includes scenes of other naked boys, including some no older than seven or eight years of age, jumping, sitting and reclining on a mattress. In addition, these boys are engaged in solo and mutual masturbation and in conduct suggesting oral-genital contact. At the end of the second film, the main child performer dresses very slowly, then picks up what appears to be United States currency and holds it toward the camera.

Respondent was indicted on two counts each of Promoting an Obscene Sexual Performance by a Child (Penal Law §263.10) and Promoting a Sexual Performance by a Child (Penal Law §263.15). He moved to dismiss the indictment, arguing that Section 263.15 is overbroad in that it prohibits promotion of nonobscene materials, which are protected by the First Amendment. Respondent's motion to dismiss the indictment was denied in an opinion by Justice Irving Lang of the New York Supreme Court. 96 Misc.2d 669, 409 N.Y.S. 2d 632 (App. C, *infra*). After the trial, at which the two films were exhibited to the jury, respondent was acquitted of the two counts of Promoting an Obscene Sexual Performance by a Child (Penal Law §263.10) but found guilty of the two counts of Promoting a Sexual Performance by a Child, which did not require proof that the films were obscene (Penal Law §263.15).

Respondent's conviction was affirmed without opinion by the Appellate Division of the New York State Supreme Court. 74 A.D.2d 558, 424 N.Y.S.2d 967 (App. B, *infra*).

On appeal to the New York Court of Appeals, respondent again argued that Section 263.15 is overbroad because it makes criminal the promotion of material which is not obscene. Holding that Section 263.15 violated the First Amendment, the New York Court of Appeals reversed and dismissed the indictment.

The Judgment Below

At the outset of its per curiam opinion, the New York Court of Appeals stated that, although it would ordinarily "interpret a statute so as to avoid constitutional infirmities, if at all possible" (App. A, at 3a), it could not read Section 263.15 in a limited way. More specifically, the court found it impossible "to save Section 263.15 by limiting its application to those who promote obscene performances" (App. A, at 3a). That limiting construction was not possible because another section, Section 263.10, makes it a crime to promote an obscene sexual performance by a child; thus, there was no doubt that the Legislature intended that Section 263.15 encompass sexual conduct by a child in performances which are not obscene (App. A, at 4a). This refusal to consider any other limiting construction makes it clear that the New York Court of Appeals, accepting the argument of respondent (*see* Appellant's Brief in the Court of Appeals, pp. 15-26), reached the conclusion that the First Amendment precludes a state from prohibiting the promotion of a performance in which a child engages in sexual conduct unless the performance is obscene.

The court went on to hold as well that even if the state's interest in protecting children from sexual abuse through exploitation by commercial interests were sufficiently com-

pelling to justify a prohibition on the dissemination even of performances which are not obscene, the New York statute is still inconsistent with the First Amendment. This was so because the legislation is "strikingly underinclusive," in that it prohibits promotion of sexual performances but does not bar the promotion of films, books or plays the production of which involves a child's performance of a dangerous stunt or his participation in any of the other numerous activities which the Legislature has determined are dangerous to the health or well-being of child employees or employees generally (App. A, at 5a-6a). According to the court, "the statute discriminates against films and other visual portrayals of nonobscene adolescent sex solely on the basis of their content" (App. A, at 6a), and it cannot be sustained because no justification is shown for protecting children from sexual abuse and not all other possible dangers (*id.*).[1]

Combining the two rationales for its decision at the conclusion of the majority opinion, the court summed up its holding:

> We merely hold that those who present plays, films and books portraying adolescents cannot be singled out for punishment simply because they deal with adolescent sex in a realistic but nonobscene manner (App. A, at 6a).

In dissent, Judge Jasen, joined by Judge Gabrielli, emphasized that the Legislature was primarily concerned

1. The court also mentioned that there was a question whether, to deter those who might exploit children in New York, the state has the power to punish the promotion in New York of materials which were produced elsewhere. The court, however, did not decide this question (App. A, at 5a).

not with the morality of those who view the child's sexual performance but with the effect of the sexual conduct on the children who were made to engage in that conduct (App. A, at 8a-9a). Judge Jasen pointed out that Section 263.15 does not purport to limit what may be said or what ideas may be expressed about childhood sexuality, but limits only the manner in which such ideas may be expressed (App. A, at 11a). In the dissenters' view, as well as that of the trial judge and apparently all five justices of the Appellate Division, this limited restriction on expression is justified by the state's compelling interest in preventing the sexual abuse and exploitation of the children (App. A, at 11a-14a). To the majority's conclusion that the statute is underinclusive, the dissenters replied that the Legislature was not required to prohibit all products of unlawful conduct involving children in order to prohibit the most serious. According to the dissenters, the distinction drawn by the Legislature is justified by the danger of severe psychological and emotional injury to children who are exploited by being made to engage in sexual conduct to satisfy the market for child pornography (App. A, at 15a).

Reasons for Granting the Writ

1) The New York State Legislature and the legislatures of nineteen other states have sought to combat the problem of child abuse by prohibiting dissemination of material depicting children engaged in sexual conduct regardless of whether the material is obscene.[2] In New York, Penal Law

2. Ariz. Rev. Stat. Ann. §13-3553; Colo. Rev. Stat. §18-6-403 (3)(b); Del. Code Ann. tit. 11, §§1108, 1109; Hawaii Rev. Stat. §707-751; Ky. Rev. Stat. §§531.320, 531.340-531.360; La. Rev. Stat. Ann. §14:81.1(A)(3); Me. Rev. Stat. Ann. tit. 17, §2923(1); Mass.

(footnote continued on next page)

Section 263.15 makes it a crime to sell films or photographs, or to produce live performances, which include sexual conduct by a child, even though the film, photograph or performance is not obscene. In this case, the New York Court of Appeals determined that Section 263.15 is unconstitutional because it makes criminal the dissemination of nonobscene films, photographs or plays.

The compelling reasons which prompted the Legislature to enact Article 263 of the Penal Law are set forth in Chapter 910 of the Laws of New York 1977, Section 1:

> The legislature finds that there has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances. . . .

As noted by Judge Jasen in his dissent below, the statute is based on the premise that the commercial traffic in child pornography encourages the sexual abuse of children by making it profitable, and that such abuse may most effectively be prevented, not merely by prohibiting the abuse directly, but by cutting short the traffic in its product (App. A, at 9a, 13a).

The reason for prohibiting the dissemination of both nonobscene and obscene materials depicting children en-

---

Ann. Laws ch. 272, §29A; Mich. Comp. Laws Ann. §750.145c (3); Miss. Code Ann. §97-5-33(4); Mont. Rev. Codes Ann. §45-5-625; N.J. Stat. Ann. §2C:24-4(5); Okla. Stat. Ann. tit. 21, §1021.2; Pa. Cons. Stat. Ann. §6312(c); R.I. Gen. Laws §11-9-1.1; S.D. Codified Laws Ann. §22-22-24; Tex. Penal Code Ann. tit. 9, §43.25(e) (Vernon); W. Va. Code § 61-8C-3; Wis. Stat. Ann. §940.203(4) (West).

gaged in sexual conduct is that the production of such materials is exploitative and damaging to the children involved, even if the product happens not to be obscene in the legal sense. For example, a twelve-year-old girl who is filmed committing fellatio while nude has been abused, regardless of whether that conduct is included in a movie which, when taken as a whole, proves not to be obscene. As was pointed out by a sponsor of New York's statute, "It is irrelevant to the child whether or not the material is obscene or has a literary, artistic, political or social value." Assemblyman Howard L. Lasher, Memorandum in Support of Assembly Bill A. 3587-B, p. 2 (*see* App. C, at 27a).

Indeed, given the statutory purpose of protecting children from exploitation by their use in the production of materials which show them in sexual conduct, it would have been incongruous for the Legislature to prohibit only the dissemination of obscene materials, since the elements of obscenity—prurient appeal, patent offensiveness and lack of serious value—all pertain to the content of the material and not to the circumstances of its production. *See* Pope, *Child Pornography: A New Role for the Obscenity Doctrine,* 1978 Ill. L. F. 711, 745. It would be equally inconsistent with that statutory purpose to permit purveyors of child pornography to defend against a charge of promoting a sexual performance by a child, by showing that the performance at issue is not obscene, however sexually exploitative it might be.

Moreover, in designing a statute to protect children from sexual abuse, the Legislature recognized that as a practical matter, it is often difficult to prove obscenity.

The concept of obscenity is complex to begin with, and its application to particular cases is "a matter of considerable delicacy," *United States* v. *Various Articles of Obscene Merchandise*, 600 F.2d 394, 402 (2d Cir. 1979), resting on often highly elusive community standards. Indeed, defense counsel have argued successfully that even though the materials at issue in a particular case are disgusting, they simply do not appeal to the prurient interest in sex, or are not patently offensive by community standards. Further, to satisfy the element of obscenity, the work in question must be examined as a whole, *see Miller* v. *California*, 413 U.S. 15, 24 (1973); N.Y. Penal Law §235.00 (1)(c), and defense counsel may succeed in persuading a jury that despite one or two scenes of a child engaged in sexual conduct, a work has serious value when considered as a whole.

In sum, an obscenity requirement would substantially diminish the effectiveness of the legislation as a means of preventing sexual abuse of children. For that reason, the New York Legislature determined not to require proof of obscenity in prosecutions under Section 263.15. In contrast, the Congress decided to include an obscenity requirement in the analogous federal statute. 18 U.S.C. §2252(a). That decision was based, in part, on an opinion by the Justice Department that virtually all child pornography would be obscene. S. Rep. No. 95-438, 95th Cong., 2d Sess. 12-14, 17-18 (1978), *reprinted in* [1978] U.S. Code Cong. & Ad. News 40, 49-52, 55; H.R. Rep. No. 95-696, 95th Cong., 1st Sess. 7 (1977). However, this opinion fails to take account of the problems inherent in any obscenity prosecution. As shown above, the prosecutorial reality is that an obscenity requirement renders convictions more difficult, thereby impeding the legislative purpose of protecting chil-

dren from sexual abuse. In addition, the Congress was influenced by the inability of the Justice Department to say with "any certainty" that legislation without an obscenity requirement "would withstand constitutional challenge." Sexual Exploitation of Children: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 137 (1977); S. Rep. No. 95-438, *supra* at 49-52, 55; H.R. Rep. No. 95-696, *supra* at 7. This concern, however, is hardly a substitute for a determination by this Court of the constitutionality of a state statute which omits an obscenity requirement in order to afford maximum protection to children from sexual abuse by commercial interests.

The wisdom of the New York Legislature's approach is, in fact, shown clearly in the instant case. Respondent was acquitted of selling an obscene film, and yet the production of his films, devoted to nothing but children masturbating, was manifestly an instance of sexual abuse. In holding Section 263.15 unconstitutional, under what it believed to be the constraint of the Federal Constitution, the New York Court of Appeals has crippled the ability of law enforcement and the judicial system to deal with the substantial and ever-increasing commercial sexual exploitation of children who are made to engage in sexual conduct for the profit of the producers and purveyors of child pornography.[3]

3. The scope of the problem of child pornography was exhaustively delineated in the congressional hearings held from May to September 1977, before enactment of the federal child pornography statute, 18 U.S.C. §2251 *et seq.* *See* Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) (hereinafter cited as Sexual Exploitation of Children I); Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st

(footnote continued on next page)

Sess. (1977) (hereinafter cited as Protection of Children Against Sexual Exploitation); Sexual Exploitation of Children, Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) (hereinafter cited as Sexual Exploitation of Children II). *See especially* Sexual Exploitation of Children I, *supra* at 41-45 (statement of Judianne Densen-Gerber, J.D., M.D., President, Odyssey Institute), 57-61, 68-71 (statement of Investigator Lloyd H. Martin, Los Angeles Police Department), 109-13 (statement of Michael Sneed, Reporter, *Chicago Tribune*), 331-32 (statement of Robin Lloyd); Protection of Children Against Sexual Exploitation, *supra* at 11-16 (statement of Sergeant Ronald Kelly, Chicago Police Department), 18-20 (statement of "Marty," child prostitute and subject in child pornography), 23-28 (statement of Guy Strait, producer of child pornography), 35-43 (statement of Gerald S. Richards, producer of child pornography); Sexual Exploitation of Children II, *supra* at 43-45 (statement of Investigator Martin), 220 (statement of then Congressman Edward I. Koch), 249-51 (statement of the Reverend Bruce Ritter, Director, Covenant House, New York City, 264-65 (statement of Dr. Densen-Gerber).

A growing awareness of the problem was extensively reflected in the news media beginning in 1977. *See, e.g.,* Sneed, Bliss, Moseley, *et al., Child Pornography: Sickness for Sale,* series of articles in *Chicago Tribune,* May 15-17, 1977, *reprinted in* Sexual Exploitation of Children I, *supra* at 428-42 *and in* Protection of Children Against Sexual Exploitation, *supra* at 131-50; *Kiddie Porn,* 60 Minutes, vol. IX, No. 33, May 15, 1977, *reprinted in* Protection of Children Against Sexual Exploitation, *supra* at 123-30; *Child Pornography: Outrage Starts to Stir Some Action,* U.S. News and World Report, June 13, 1977, p. 66; *Child's Garden of Perversity,* Time, April 4, 1977, p. 55, *reprinted in* Sexual Exploitation of Children I, *supra* at 423; Ditkoff, *Child Pornography,* American Humane, April 1978, pp. 29-32; Anson, *The Last Porno Show,* 8 New Times 46 (1977), *reprinted in* Protection of Children Against Sexual Exploitation, *supra* at 150-58. *See also* Campbell, *Help Sought for Children Used in Pornography, New York Times,* Jan. 14, 1977, Pt. II, p. 3, col. 1 (magazines entitled "Lollitots," "Moppets," "Brat" and "Tots" depicting children ages three to sixteen in lewd and suggestive poses sold in pornographic bookstores in Times Square); Ivins, *Eight Held as Principles in Smut Production, New York Times,* April 27, 1977, p. 1, col. 6 (4,000 copies of pornographic "peep-show" films depicting children eight to twelve years old seized in two raids in Manhattan); Sexual Exploitation of Children I, *supra* at 41 (statement of Dr. Densen-Gerber); Sexual Exploitation of Children II, *supra* at 220 (statement of Congressman Koch), 249-51 (statement of Bruce Ritter). *See also* R. Lloyd, *For Money or Love: Boy Prostitution in America* (1976); Guio, Burgess and Kelly, *Child Victimization: Pornography and Prostitution,* 3 J. of Crime and Justice 65 (1980); Burgess, Groth and McCausland, *Child Sex Initiation Rings,* 51 Am. J. Orthopsych. 110 (1981).

Of course, we recognize that no matter how serious the evil of the sexual abuse of children for profit and no matter how reasonable the legislative response to that evil, certiorari would not be called for if the majority below was unquestionably correct in its legal determination. That determination, however, as we will now show, raises substantial questions which warrant review by this Court.

2) The Court of Appeals decision permits the state to prosecute the dissemination of child pornography only if the pornography is legally obscene, despite the irrelevance of obscenity to the harm at which Section 263.15 is directed. To be sure, the majority opinion expressly acknowledges that the state's "legitimate interest in protecting the welfare of minors within its borders . . . may transcend first amendment concerns" (App. A, at 4a-5a). Nonetheless, the majority seemingly concludes that Section 263.15 is unconstitutional simply because it prohibits the promotion of materials which, because they are not obscene, "are traditionally entitled to constitutional protection from government interference under the First Amendment" (App. A, at 3a). The opinion then goes on, however, to make the quite different argument, seemingly in the alternative, that even if the Legislature is empowered to protect children by prohibiting dissemination of materials portraying children engaged in sex without regard to obscenity, Section 263.15 is unconstitutionally "underinclusive" because it does not prohibit the dissemination of materials portraying children engaged in other, non-sexual, types of harmful conduct (App. A, at 5a-6a).

On either rationale, the court's decision presents for review a substantial question concerning the balance to be

struck between the state's interest in protecting children from sexual abuse, and the free-speech interest, if any, in disseminating films or photographs or producing plays which show children engaged in such conduct as sexual intercourse, sodomy, masturbation or lewd exhibition of the genitals. This Court, in determining the scope of first amendment protection, has recognized the state's legitimate, indeed compelling, interest in safeguarding its children from abuses which might prevent their "growth into free and independent well-developed men and citizens." *Ginsberg* v. *New York*, 390 U.S. 629, 640-41 (1968), quoting *Prince* v. *Massachusetts*, 321 U.S. 158, 165 (1944). This case presents the significant question whether nonobscene materials showing children engaged in sexual conduct are protected by the First Amendment, or whether the state may legitimately proscribe such materials in order to prevent the sexual abuse necessarily involved in their production.

As the New York court acknowledged, the state interest in protecting children does at times transcend first amendment concerns. Thus, for example, in *Ginsberg*, not cited by the court below, this state interest was held to justify the New York Legislature's determination to prohibit the dissemination to minors of "girlie" magazines even though their dissemination to adults could not be prohibited, on the grounds that such materials are harmful to minors. This Court found that the interest in protecting minors prevailed over any free-speech interest in buying and selling the magazines at issue, so long as the Legislature could rationally find that such magazines are harmful to minors. Moreover, this Court held that the Legislature's finding that the material is harmful need not be based upon accepted

scientific fact; it was sufficient that the harmfulness of the materials had not been scientifically disproved. 390 U.S. at 641-43.

To be sure, the statute at issue in *Ginsberg* prohibited only dissemination to children, while Section 263.15 prohibits the dissemination of the prohibited materials to adults. Nevertheless, if the state is entitled to promote "the ethical and moral development" of children, *Ginsberg* v. *New York*, 390 U.S. at 641, by preventing them from reading "girlie" magazines, there is certainly a serious question whether the state may be denied the power to prevent the actual sexual abuse of children by prohibiting altogether the dissemination of the products of that abuse. The effects of using children in the production of pornography have not yet been extensively studied, due to the recency of the problem as a major social issue. Nevertheless, there is scientific support for the conclusion that such use is harmful,[4] and as in *Ginsberg*, it is significant

4. Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289 (1980). Schoettle suggests that the effects of using children to produce pornography resemble those of incest, *id.* at 296-97, and there is wide agreement that incest can bring about substantially harmful effects, such as guilt, depression, feelings of worthlessness and psychologically induced somatic disorders. *See, e.g.*, Summit and Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, 48 Am. J. Orthopsych. 237 (1978); Lewis and Sarrel, *Some Psychological Aspects of Seduction, Incest and Rape in Childhood*, 8 J. Am. Acad. Child Psych. 606 (1969); D. Finkelhor, *Sexually Victimized Children*, 31-32, 97-108, 185-214 (1979); R. Kempe and C. Kempe, *Child Abuse* 54-56 (1978). In addition to these psychological effects, there is evidence linking incest with specific pathological behaviors such as prostitution, James and Meyerding, *Early Sexual Experience As a Factor in Prostitution*, 7 Archives of Sexual Behavior 31 (1978); Sexual Exploitation of Children II, *supra* note 3 at 135 (statement of Henry Giarretto, Director, Santa Clara County Child Sexual Abuse Treatment Pro-

(footnote continued on next page)

that the harmfulness of such use has by no means been scientifically disproved. Moreover, as emphasized in the congressional hearings, child pornography is produced secretly. Thus, there are compelling reasons to attack the commercial sexual exploitation of children by banning traffic in the products of that exploitation.[5] Therefore, it was quite rational for the New York Legislature to find that the use of children as subjects in sexual performances is a form of sexual abuse and to proscribe the dissemination of such performances, without regard to their obscenity, as a means of preventing that abuse.

Given this rational basis for the Legislature's decision to prohibit the promotion of child pornography, a substantial question is also raised by the second ground for the New York Court of Appeals decision, that the statute is unconstitutionally "underinclusive." In reaching this conclusion, the court below relied solely on *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), but that case is inapposite. In *Erznoznik*, a Jacksonville city ordinance made it unlawful for a drive-in theatre to exhibit movies containing nude

---

gram), drug abuse, Benward and Densen-Gerber, *Incest As a Causative Factor in Anti-Social Behavior: An Exploratory Study*, 4 Contemp. Drug Prob. 322 (1975), and abuse of the victim's own children. Summit and Kryso, *supra* at 248. *See generally* K. Meiselman, *Incest: A Psychological Study of Causes and Effects with Treatment Recommendations* 194-261 (1978). To the extent that the use of a child in the production of pornography resembles incest, it may be expected to have the same pathological results.

5. Sexual Exploitation of Children I, *supra* note 3 at 11 (statement of Frank Osanka, Professor of Social Justice and Sociology and specialist in child abuse and neglect), 34 (statement of Charles Rembar), 69 (statement of Investigator Martin), 142 (statement of Assistant Attorney General John C. Keeney), 162 (statement of then Congressman John M. Murphy); Sexual Exploitation of Children II, *supra* note 3, at 118-19 (statement of Robin Lloyd), 254 (statement of Bruce Ritter), 272-73 (statement of Charles Rembar).

scenes if such movies could be seen from a public place. During oral argument, counsel for the city argued that the purpose of the ordinance was to permit the smooth flow of traffic. In observing that the ordinance was underinclusive, this Court pointed out that the ordinance singled out one form of protected speech (movies with nudity) but failed to regulate other protected speech (other movies, *e.g.*, ones containing violence) which created the same danger to traffic. Thus, it appeared that the ordinance was designed to censor content rather than facilitate the flow of traffic.

Here, however, as shown above, special concerns about children justify the statutory classification. Surely, as noted by the dissent below, the New York Legislature could reasonably conclude that other types of harm to children that might result from their participation in illegal performances, *e.g.*, injury from dangerous stunts, are not threats of the same type or of the same magnitude as those involved in sexual abuse. Moreover, there is no evidence to suggest that such stunts or other kinds of dangerous employment are not effectively dealt with by the direct prohibition of the use of children in such circumstances. In contrast, there is ample support for the Legislature's conclusion that it is difficult, if not impossible, to deal with the problem of sexual abuse of children by merely prohibiting the use of children as subjects in sexual performances. *See* authorities collected in note 5, *supra*.

Moreover, as noted, this Court has recognized that a legislature may deal with one part of a problem at a time. *See, e.g., Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488-89 (1955). And even though the classification here involves

a form of expression, there has been no attempt, as in *Erznoznik*, to censor expression because of its message, idea, subject matter or content. Rather, the purpose here is to protect children from sexual abuse; and whether that is a sufficient basis for the classification, given the sexual abuse involved in the production of child pornography, presents a significant constitutional question.

Finally, the issues presented here are narrow. The New York Court of Appeals believed that no limiting construction consistent with the First Amendment can be placed on Section 263.15, and held that any prohibition of the dissemination of nonobscene materials which depict sexual conduct by children is impermissible. If this Court rules that the Constitution does not afford such blanket protection, and that the dissemination of such nonobscene materials can in some defined circumstances be prohibited, then it will be left to the Court of Appeals on remand to determine whether Section 263.15 can be construed so as to prohibit the promotion of nonobscene materials only under those proper circumstances.

Equally narrow is the question whether Section 263.15 is unconstitutionally underinclusive. This issue too turns on the scope of protection afforded nonobscene materials which include sexual conduct by a child, and also on the state's power to regulate the promotion of such material while not regulating the dissemination of material containing other, non-sexual, types of prohibited conduct by children.

* * *

In sum, substantial evil flows from filming, photographing, or producing live performances of children who are

made to engage in sexual conduct. Whether, to prevent that evil, the state is justified in prohibiting the production and sale of such films, photographs or live performances is a question which calls for definitive resolution by this Court.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Petitioner

ROBERT M. PITLER
MARK DWYER
DONALD J. SIEWERT
Assistant District Attorneys
Of Counsel

July 11, 1981